COLUMBIA LAW REVIEW.

Published monthly during the Academic Year by Columbia Law Students.

SUBSCRIPTION PRICE, $2.50 PER ANNUM — 35 CENTS PER NUMBER

FEBRUARY, NINETEEN HUNDRED AND FOURTEEN.

NOTES.

APPLICATION OF THE COMMERCE CLAUSE TO THE INTANGIBLE.—The use of Marshall's often-quoted description that "commerce is intercourse"[1] as a sufficient definition with which to interpret the commerce clause,[2] would bring every contract between citizens in different States under the jurisdiction of Congress. But it should be remembered that he was attempting no formal test,[3] and that the definition most frequently approved by the Supreme Court is the narrower one laid down

[1]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 189.
[2]U. S. Const., Art. 1, § 8; subd. 3.
[3]9 Michigan Law Rev. 324, 326.

in *County of Mobile* v. *Kimball*,[4] which explains the term "intercourse", and returns to the earlier conception of commerce as a transportation of the tangible.[5] That telegraph companies are engaged in interstate commerce, received early judicial recognition.[6] This, however, seems to have been due more to a desire to have uniform federal regulation of such an important adjunct to commerce as the telegraph than to a realization that the transmission of telegraphic information is commerce.[7]

The older conception of commerce as an exchange of commodities has governed the interpretation of insurance contracts.[8] In the pioneer attempt of a correspondence school to escape state regulation,[9] the state court, applying the doctrine of the insurance cases, refused it freedom from that restraint; but the Supreme Court in a later case,[10] wisely confining the authority of the insurance cases to the points decided, held that such intercourse or communication through the mails is commerce. The telegraph cases were cited as authorities for the decision, and little reliance, apparently, was placed on the fact that the plaintiff's business also incidentally involved the transportation of text books and other tangible articles of traffic. Considering these latter facts, there seems little doubt that the case was correctly decided, and that it did not necessarily extend the previous conception of commerce. The language of the court, however, was regarded as throwing a new light on the meaning of the telegraph cases; so it was argued that in view of this later decision the Supreme Court must conceive of the telegraph message as bearing the same relation to the telegraph system that an article of merchandise bears to the railway system, and that it is equally a subject of commerce. The case has, therefore, been quoted as indicating that the mere transmission of in-

[4](1880) 102 U. S. 691, 702. "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and the transit of persons and property, as well as the purchase, sale, and exchange of commodities." This was approvingly quoted in McCall *v.* California (1890) 136 U. S. 104, 108; Lottery Cases (1903) 188 U. S. 321, 351.

[5]58 Pennsylvania Law Rev. 411.

[6]Pensacola Tel. Co. *v.* Western U. Tel. Co. (1877) 96 U. S 1; Western U. Tel. Co. *v.* Pendleton (1887) 122 U. S. 347. Its applicability to communication by telephone has also been recognized. Muskogee Nat. Tel. Co. *v.* Hall (C. C. A. 1902) 118 Fed. 382.

[7]See Western U. Tel. Co. *v.* Pendleton, *supra*, p. 358.

[8]Paul *v.* Virginia (1868) 8 Wall. 168; Hooper *v.* California (1895) 155 U. S. 648; see note on "Relation of Insurance to Interstate Commerce", at p. 149 *infra*.

[9]International Textbook Co. *v.* Peterson (1907) 133 Wis. 302. In International Textbook Co. *v.* Lynch (1908) 81 Vt. 101, the court based its decision on the additional ground that the transportation of letters, etc., is regulated by the postal laws and not by the laws of interstate commerce. It has been suggested that this reasoning applies to mercantile agencies, 71 Central Law Journ. 201.

[10]International Textbook Co. *v.* Pigg (1910) 217 U. S. 91. The case of International Textbook Co. *v.* Gillespie (1910) 229 Mo. 397, obeys the authority of the leading case, but Judge Valliant in a separate concurring opinion, p. 423, deplores the court's abandonment of the primary conception of commerce.

formation from one State into another is of itself sufficient to constitute interstate commerce.[11]

By the recent case of *U. S. Fidelity & Guaranty Co.* v. *Kentucky* (1913) 34 Sup. Ct. Rep. 122,[12] the controversy seems to have been set at rest. The plaintiff in error was a Maryland commercial agency with attorneys in Kentucky who informed inquirers concerning the financial standing of local merchants. Relying on the authority of the *Textbook Case,*[13] it was urged that the corporation was exempt from the state tax sought to be enforced, because, through its agents, information was sometimes sent across the state line by mail, telephone or telegraph, to merchants engaged in interstate commerce. The court decided that the plaintiff's business was too remotely and indirectly connected with any transportation of goods from one State to another to be considered an incident of interstate commerce. A like conclusion was reached in the only other reported case on the point,[14] which was decided before the status of a correspondence school had been authoritatively determined by the Supreme Court, and was put on the ground that a mercantile agency is not such an important instrument of commerce that it should be grouped with the telegraph and telephone. It is impossible to doubt the court's wisdom in declining to interfere further with the State's taxing power unless the burden on interstate commerce be direct and substantial, and its treatment of commercial agencies in this respect is essentially practical. The distinction attempted to be drawn, however, that if any commercial contracts resulted, they were made between the local inquirers and the foreign merchants concerning whose credit information was furnished, and not between the parties to the correspondence in question, seems a rather tenuous one. In requiring a direct connection between the transportation of commodities and the interstate transmission of information before the latter will be termed commerce, the court adopts the earlier conception of commerce and refuses to extend the application of the commerce clause to the intangible.

RELATION OF INSURANCE TO INTERSTATE COMMERCE.—The remarkable development in the United States of insurance as an interstate business, and the increasing tendency on the part of the states to restrict the powers of foreign insurance companies through taxation and local regulations, have provoked an insistent demand during the last decade for a broadened construction of the Commerce Clause[1] that will permit of the federal supervision of insurance,[2] in all but its intrastate aspects. That the effecting of fire insurance between companies and citizens domiciled in different states does not fall within the purview of the Clause was early announced in the leading case of *Paul* v. *Virginia;*[3] and this principle was later declared applicable to

[11]24 Harvard Law Rev. 230; 8 Michigan Law Rev. 663, 664; but see 23 Harvard Law Rev. 644.

[12]Affirming U. S. Fidelity & Guaranty Co. *v.* Commonwealth (1910) 139 Ky. 27.

[13]International Textbook Co. *v.* Pigg, *supra.*

[14]State *v.* Morgan (1891) 2 S. Dak. 32, 54.

[1]U. S. Const., Art. 1, § 8, subd. 3.

[2]29 Rep. Amer. Bar Assn. 538 (1906).

[3](1868) 8 Wall. 168.